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Supreme Court of The United States

No. 299

MRS. CHARLES JARVIS, ET AL,
Petitioner,

versus

UNITED STATES OF AMERICA, ET AL,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RAYMOND H. KIERR
Proctor for Petitioner

KIERR & GAINSBURGH,
ELDON E. FALLON
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INDEX

	Page
Citation to Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	3
Reasons for Granting Writ	4
Appendix A	9
Appendix B	15

INDEX OF AUTHORITIES

STATUTES:

Federal Employees Compensation Act, 5 U.S.C. 751 *et seq.*	3
Jones Act, 46 U.S.C. 688	3
Judicial Code, 28 U.S.C. 1254 (1)	2

CASES:

Johansen v. United States, 343 U.S. 427 (1952)	8
Johnson v. United States, 89 F. Supp. 65 (E.D. Va. 1949)	5
Patterson v. United States, 359 U.S. 495 (1958)	8

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TO THE HONORABLES THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners[1] respectfully petition this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit which was rendered in the cause on March 29, 1965.

CITATION TO OPINIONS BELOW

The United States District Court for the Eastern District of Louisiana rendered an opinion supporting its final decree of March 7, 1963, granting the Government's motion for summary judgment, reported in 212

[1]The petitioners are Gloria Nepveaux, recognized by the Government as a person entitled to receive compensation if she is due no damages; Mrs. Charles Jarvis, to the extent that she may be entitled to damages beyond compensation paid to her; and the following claimants who have received neither compensation nor damages: Joseph Cummings, Mrs. Eddie M. Terrell, Mrs. Ida Ripley, John E. Packard, H. H. Tatlock, Andrew J. Butts, Clem Collins, Harlem McKellar, Louie Keeling, Bennie Showers, and Luther L. Powers; their individual and representative capacities are shown in the Notice of Appeal, R. p. 157.

F. Supp. 214 (E.D. La., 1964); a subsequent order denying motion for rehearing and a plea of estoppel was entered on May 29, 1963 (set forth in Appendix A *infra*). The Court of Appeals for the Fifth Circuit affirmed per curiam and adopted the opinion of the district court (set forth in Appendix B, *infra*).

JURISDICTION

This matter involves the interpretation and application of the Federal Employees' Compensation Act (5 U.S.C.A. 751 *et seq.*), and the Jones Act (46 U.S.C. 688 *et seq.*).

The judgment of the Circuit Court of Appeals was entered on March 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

The novel and important question of law presented for determination in this proceeding is:

> Should courts of law disregard the intent and the express provisions of valid federal statutes, with the result that merchant seamen and their survivors are denied the statutory right to seek damages instead of workmen's compensation?

When a federal court is permitted to disregard the specific legislation and intent of the Congress, it is submitted that (a) uncertainty is created, (b) uniformity is endangered, and (c) encouragement is afforded to state courts, if not to all courts and to their officers, to loosely interpret federal laws.

STATEMENT OF THE CASE

On March 4, 1948, the Towboat NATCHEZ was proceeding with a tow of six barges up the Mississippi River on a voyage to Mount Vernon, Indiana. The NATCHEZ was owned by Inland Waterways Corporation, a wholly owned governmental agency.

As the NATCHEZ and her barges approached the Greenville Bridge, she divided her tow so as to push only three barges through the bridge at one time. While attempting the first pass pushing three of these heavily laden barges, there was a collision with the bridge pier. The NATCHEZ and thirteen members of her crew were lost.

On August 31, 1948, the government filed a petition herein for limitation of liability and enjoined all suits for damages.

One year later the government filed its motion suggesting that certain claimants in the NATCHEZ disaster were seeking damages in the limitation proceeding under the Jones Act, 46 U.S.C. 688 *et seq.*, as well as compensation under the Federal Employees' Compensation Act, 5 U.S.C. 751-793. In its motion the government asked the judge to order all claimants to make an election between these two remedies. The Federal District Court for the Eastern District of Louisiana granted the motion and ordered the claimants to elect whether they claimed compensation or damages. They complied with the order, and elected to recover damages.

In 1962, fourteen years after it had filed its petition

for limitation and thirteen years after it had filed a motion asking the court to compel the claimants to elect between damages and the Federal Employees' Compensation Act, the government reversed its position. It moved for summary judgment, asking that the claims for damages brought in the limitation proceeding be dismissed, on the contention that the Federal Employees' Compensation Act was the claimants' exclusive remedy. Such a result is in conflict with the words and intent of the Federal Employees' Compensation Act, and is inconsistent with the position the government had maintained from 1948 until 1962. Nevertheless, the court granted the motion and dismissed the claims which appellants had elected to make for damages.

The Court of Appeals for the Fifth Circuit affirmed the judgment of the lower court, adopting its opinion, per curiam.

For the following reasons, petitioners apply for a writ of certiorari to review the opinions below to the end that petitioners' cause of action for damages may be reinstated and remanded to the District Court for a trial on its merits.

REASONS FOR GRANTING THE WRIT

I. The decisions below are contrary to the words and intent of the Federal Employees' Compensation Act.

Prior to 1949, the Federal Employees' Compensation Act (5 U.S.C. 751 *et seq.*) contained no provision expressly making it the exclusive remedy for employees of the United States or its wholly owned corpora-

tions. It was not until October of 1949 that the Act was amended to read: "(b) The liability of the United States or any of its instrumentalities under sections 751-756, 757-791 and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive." 5 U.S.C., Sec. 757(b).

Prior to 1949, a seaman injured aboard a vessel owned by the United States or one of its instrumentalities had a choice either to seek compensation under the Act or to sue his employer in admiralty. See *Johnson v. United States*, 89 F. Supp. 65 (E.D., Virginia, 1949). The issue is whether the 1949 amendment retroactively affected a seaman's right to elect the remedy he wished to pursue. This is resolved by the legislative intent which is revealed through a reference to the Congressional Record compiled during the passage of the 1949 amendments.

It should be noted that during 1949 Section 305, currently Section 791-4 (b), was amended to provide that **"(b) nothing contained in this act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel".** (Emphasis added.)

The legislator who drafted this amendment clearly enunciated the reasons for and the intent of the new matter. He stated that "Subsection (b) of the proposed new section 305 is intended out of caution, to reaffirm what is accomplished by the proposed amendment to section 201 of the bill, lest some other provision of the bill which, in some way not now foreseen, might be construed to take away **any election of remedies that seamen might now have.** The new subsection would

make clear that no provision of this amending act, as distinguished from the existing Compensation Act itself, shall be construed to affect any maritime rights or remedies of seamen. The purpose is to reserve to seamen whatever rights they now have, or may be held to have, under maritime law, and to allay the fears that have been expressed that the amendments to the Compensation Act being made by this bill will be construed to negate or reduce any of the maritime rights and remedies of seamen". 95 Cong. Rec. 13608. (Emphasis added)

Before 1949 seamen injured aboard vessels owned by the United States or its corporations clearly had a choice of remedies. It was the specific intent of Congress to retain that choice. Congress never intended that seamen employed by the government would be denied the rights and remedies afforded to other seamen not employed by the United States. Such discrimination would create inequities, and could lead to labor disputes and other problems.

Congress was especially concerned with *preserving the choice of remedies to those seamen* employed by the United States or its instrumentalities who were *injured prior to the 1949 amendment* declaring the exclusiveness of the Federal Employees' Compensation Act. Congressional concern was summed up in the Senate thusly:

> ". . . the effect of [the exclusive remedy amendment of 1949] would be to substitute the remedies provided in the Compensation Act for remedies being pursued by federal employees in a large number of civil and ad-

> miralty actions. Thus rights, if any, presently existing and being asserted in pending court proceedings would be wiped out, automatically. It appears to me that such retroactive effect is not desirable or equitable. Claimants merit better treatment from their Government." 95 Cong. Rec. 13608

In order to give maritime claimants "better treatment" Congress provided that **"any person who has commenced a civil action or an action in admiralty with respect to such injury of death prior to [1949, the date of enactment of the act] shall have the right at his election to continue such action notwithstanding any provision of this Act to the contrary. . ."** See 5 U.S.C. §757, note re "Retroactive effect of 1949 amendment."

The loss for which petitioners seek recovery occurred in 1948; libel were filed therefor under the Suits in Admiralty Act, 46 U.S.C.A. 741 *et seq.*, and claims for damages were filed in the limitation proceedings, in the same year. Congress has said unequivocally that actions for damages are available notwithstanding the subsequent passage of an amendment to the Federal Employees' Compensation Act making that Act the exclusive remedy for federal employees. The judgment below holds diametrically opposite to the express words of the statute.

Can a trial judge by his decree, or the government by its silence, or a court of appeal through a succinct

per curiam, properly ignore the clear-cut enactment of Congress?[2]

II. IMPORTANCE OF THE QUESTION PRESENTED

The courts below disregarded the words and intent of the Federal Employees' Compensation Act. This error contravenes constitutional principles as well as the very essence of our judicial system. Such a precedent, if allowed to prevail, will disrupt the certainty and uniformity which have been considered always indispensable elements of maritime law.

It is, therefore, in the public interest that the problem presented by this application be resolved.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that a writ of certiorari should issue herein to the United States Court of Appeals for the Fifth Circuit and that, after due proceedings had, the judgment of that court may be reviewed and reversed, to the end that petitioners' claims for damages shall

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[2]For Your Honors to permit petitioners to pursue their chosen remedy for damages would not conflict with this Court's holdings in *Johansen v. United States*, 343 U.S. 427 (1952) and *Pattterson v. United States*, 359 U.S. 495 (1958). These decisions are not applicable to the instant case: In *Johansen* the vessel on which the libelant was injured was a *public* vessel; in the instant case the vessel was a *merchant* vessel. In the Patterson case, although the vessel was a merchant vessel, that accident (unlike the case at bar) *did not occur before 1949* and the Court was not confronted with the effect of the 1949 amendment on injuries occurring prior to the enactment of the amendment.

be reinstated and remanded to the District Court for trial on the merits.

RAYMOND H. KIERR
Proctor for Petitioners

KIERR & GAINSBURGH,
ELDON E. FALLON
Of Counsel

APPENDIX A

OPINION OF THE TRIAL COURT

(Number and Title Omitted)

(Filed: Dec. 28, 1962)

AINSWORTH, District Judge:

Petitioners, the United States of America and the Inland Waterways Corporation, a wholly owned Government agency created by Act of Congress, have filed a motion pursuant to Rule 58 of the Admiralty Rules of Practice for summary judgment, dismissing all of the several claims for death or injury made by several claimants herein as a result of a disaster which occurred on March 4, 1948. On that day the Towboat NATCHEZ, owned by the Inland Waterways Corporation, was proceeding with a tow of six barges up the Mississippi River on a voyage to Mount Vernon, Indiana. Upon arriving at the Greenville, Mississippi

bridge and while preparing to double trip the tow the NATCHEZ collided with a bridge pier and sank, resulting in the death of thirteen members of her crew and personal injuries to several crewmen.

The claims herein are asserted under the Jones Act, 46 U.S.C.A. 688, the General Maritime Law and the Suits in Admiralty Act, 46 U.S.C.A. 741-752, limitation being authorized under provisions of 46 U.S.C.A. 746.

Petitioners maintain that these claims should be dismissed because claimants have no right to proceed under the statutes referred to, it being contended that the exclusive rights of claimants are to compensation benefits under the Federal Employees' Compensation Act, 5 U.S.C.A. 751, et seq., and especially 5 U.S.C.A. 759, note. It is stated that all the deceased and injured crew members of the NATCHEZ were Civil Service employees of the United States and covered under the Federal Employees' Compensation Act.

By the Act of October 14, 1949, 5 U.S.C.A. 757, note, the Federal Employees' Compensation Act was amended to provide a procedure for claimants whose suits had already been filed and to declare the exclusiveness of the remedy under the Act. The Act of October 14, 1949 also amended 5 U.S.C.A. 757 and made an express declaration that the Act was exclusive as to all others except seamen.

The sole question for determination is whether the exclusive remedy for death or injury of crew members employed by the Inland Waterways Corporation on its vessel NATCHEZ is compensation under the Federal Employees' Compensation Act. If this is so, the motion

for summary judgment must be granted and the several suits of claimants dismissed as well as their claims in the limitation proceedings and the petition for limitation itself since it no longer serves any useful purpose.

The precise question has been passed on by the Supreme Court in *Patterson* v. *United States*, 359 U. S. 495, 79 S. Ct. 936 (1959), affd. 2 Cir., 1958, 258 F. 2d 702, which cited with approval that Court's prior decision in *Johansen* v. *United States*, 343 U. S. 427, 72 S. Ct. 849 (1952). Claimants contend that the NATCHEZ was engaged in transporting non-Government cargo and that there was no public service being rendered at the time of the casualty. But the Court declared in *Johansen* that the exclusive nature of the Federal Employees' Compensation Act was equally applicable to cases where the Government vessel is engaged in merchant service. Claimants also contend that since the claims here are based on a casualty which occurred in 1948, prior to the passage of the amendments to the Compensation Act in 1949, providing for exclusiveness, Congress indicated when it made its declaration in 1949 that the Act was not exclusive prior to that time. However, the same argument was made in *Johansen* and rejected by the Supreme Court. Johansen himself had been injured several months prior to the passage of the Act of October 14, 1949, and the Court held that his exclusive remedy was under the Compensation Act.

The *Patterson* case was not decided until 1959. The present petition for limitation was filed August 31, 1948, more than ten years prior to a decisive holding by the Supreme Court in the *Patterson* case as to the exclusiveness of the remedy for personnel as involved

here. The holding in *Patterson* is the law, and we have no alternative but to follow it.

The affidavit filed in support of the motion discloses that repeated efforts have been made by the United States to have the claimants file for the benefits provided by the Federal Employees' Compensation Act. Most of them have done so and have been paid what is due them; the others[1] who are involved here were notified of their rights, were furnished the necessary claim forms but have, for reasons best known to themselves, declined to file for Federal compensation. Our decision will not affect their rights to pursue their claims for compensation and is made without prejudice to them. All of the remaining claims in the limitation proceedings are on behalf of employees of the NATCHEZ.

The United States has orally stated at argument of this motion that the limitation proceedings should be dismissed if the court should hold that the several claimants' exclusive remedy is to Federal compensation.

Claimants urge in their brief that the United States has estopped itself to urge that the exclusive remedy here is Federal compensation, by the filing in 1948 by the Government of the limitation proceedings. No formal plea of estoppel has been filed, however. Precisely what claimants have done to their prejudice by the action of the United States here is not clearly indicated. The affidavit of the United States and its answers to claimants' interrogatories (uncontradicted by

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[1]Answers to interrogatories filed herein by the United States indicate that the only remaining claimants are Mrs. Mary Ruth Jarvis (now Mrs. Kommene) and Gloria Nepveaux.

countervailing affidavits) show that the Government has always contended that claimants should file for Federal compensation. They were repeatedly urged to do so. Generally, the Government as the sovereign is not subject to a plea of estoppel. *Legerlotz* v. *Rogers*, C. A. D. C., 1959, 266 F. 2d 457, 459, n. 5. Nevertheless, in a "proper case" an estoppel may be asserted against the United States[2] but ". . . such a doctrine is to be applied only with caution against the United States. . . ." *First National Bank of Montgomery v. United States*, D. C. M. D. Ala., 1959, 176 F. Supp. 768, 772, affirmed per curiam 5 Cir., 1961, 285 F. 2d 123. The circumstances here do not warrant a finding that the United States is estopped.

The motion for summary judgment is, therefore, granted, and all the several claims in the limitation proceedings and the limitation proceedings themselves are dismissed.

(Signed) ROBERT A. AINSWORTH, JR.
United States District Judge

New Orleans, Louisiana
December 28, 1962

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[2] 31 C. J. S. §140, Estoppel.

ORDER DENYING MOTION OF MRS. MARY JARVIS KOMENE AND OTHER CLAIMANTS FOR REHEARING AND ORDER DENYING PLEA OF ESTOPPEL FILED BY MRS. CHARLES JARVIS AND OTHER CLAIMANTS

MINUTE ENTRY May 29, 1963 AINSWORTH, J:

(Number and title omitted)

This cause came on this day for hearing on motion of Mrs. Mary Jarvis Komene and other claimants for rehearing to the end that the decree of dismissal be vacated, annulled and set aside.

PRESENT: Kathleen Ruddell,
Assistant U. S. Attorney

Raymond H. Kierr, Esq.
Proctor for Claimants

IT IS ORDERED that motion of Mrs. Mary Jarvis Komene and other claimants for rehearing to the end that the decree of dismissal be vacated, *annuled* and set aside be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED that plea of estoppel filed by Mrs. Charles Jarvis and other Claimants be, and the same is hereby DENIED.

APPENDIX B

OPINION OF THE COURT OF APPEALS

PER CURIAM: Upon careful consideration of this appeal, we conclude that the judgment of the trial court should be affirmed. We can add nothing to the reasoning of the trial court, and, therefore, approve the opinion and adopt it as the opinion of this Court. See Petition of the United States of America Represented by Inland Waterways Corporation, a Government Agency; and, the Inland Waterways Corporation, a Government Agency, Wholly Owned by the United States, Created by Act of Congress as a Corporation of Columbia, the Documented Owner of the River Towboat Natchez, for Exoneration from, and/or Limitation of Liability. 212 F. Supp. 214.

The judgment is AFFIRMED.

CERTIFICATE OF SERVICE

I, Raymond H. Kierr, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have this day served upon the respondent herein a copy of the attached application for certiorari with its appendices, by delivering same to the United States Attorney, 400 Royal Street, New Orleans, Louisiana, and by mailing same to the Attorney General of the United States, Washington, D. C., by depositing same in the United States mail, postage prepaid, certified mail, this 25th day of June, 1965.

_____

Raymond H. Kierr

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 299

MRS. CHARLES JARVIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

A collision of the towboat *Natchez* with a Mississippi River bridge, occurring in 1948, resulted in the sinking of that vessel and the injury and death of members of its crew. The *Natchez* was the property of the former Inland Waterways Corporation, a wholly owned agency of the federal government. Following the accident, the government filed a petition in admiralty for exoneration from or limitation of liability. That petition expressly alleged that all the

deceased or injured crewmen were government employees entitled to the benefits of the Federal Employees Compensation Act, 5 U.S.C. 751 *ff.*, and that steps had been taken to provide the appropriate compensation benefits.

Petitioners, dependents of the injured seamen seeking to recover damages allegedly suffered as a result of the accident, asserted claims against the United States under the Jones Act[1] in the admiralty proceeding. The district court, relying on *Patterson* v. *United States*, 359 U.S. 495, and *Johansen* v. *United States*, 343 U.S. 427, dismissed petitioners' claims on the ground that the Compensation Act remedy was their exclusive avenue of relief against the federal government. *Petition of United States (Towboat Natchez)*, 212 F. Supp. 214 (E.D. La.) (Pet. 9). The court of appeals affirmed, *sub nom. Jarvis* v. *United States*, 342 F.2d 799 (C.A. 5), adopting the opinion of the district court as its own (Pet. 15). On May 29, 1965, the Fifth Circuit denied petitioners' timely motion for rehearing (Pet. 14).

In *Johansen* and *Patterson*, this Court squarely held that for merchant seamen employed by the United States, as for other federal civilian employees, the Federal Employees Compensation Act provides the exclusive mode of redress against the government for injuries received in the course of employment. There is no conflict among the circuits on this point.[2] The

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[1] 46 U.S.C. 688.

[2] See, *e.g.*, *Mills* v. *Panama Canal Co.*, 272 F.2d 37 (C.A. 2), certiorari denied, 362 U.S. 961; *Balancio* v. *United States*,

contention made in the instant petition—that prior to the 1949 amendments expressly declaring the Compensation Act an exclusive remedy,[3] injured federal merchant seaman could elect either Jones Act or Compensation Act relief against the government and that a purpose of the 1949 amendments was to preserve that election (Pet. 6)—was specifically rejected by the Court in *Johansen* v. *United States*, 343 U.S. 427, 435-441, where the *Johnson* case upon which petitioners rely[4] was also expressly disapproved, *Id.* at 439. And in *Patterson* v. *United States*, *supra*, the Court declined to reconsider *Johansen*, stating (359 U.S. at 496-497):

> If civilian seamen employed by the Government are to be accorded rights different from or greater than those which they enjoy under the Compensation Act, it is for Congress to provide them.

Petitioners' remaining contention—that the institution of the limitation proceeding in admiralty waived the government's defense that petitioners were restricted to their compensation remedy—is also without merit. *Petition of Spearin, Preston & Burrows*, 190 F.2d 684 (C.A. 2).[5]

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267 F.2d 135 (C.A. 2); *Sasse* v. *United States*, 201 F.2d 871 (C.A. 7); *Mandel* v. *United States*, 191 F.2d 164 (C.A. 3).

[3] 63 Stat. 854, 861, 5 U.S.C. 757(b).

[4] *Johnson* v. *United States*, 89 F. Supp. 65 (E.D. Va.), reversed, 186 F.2d 120 (C.A. 4).

[5] Petitioner's intimations to the contrary notwithstanding, the district court correctly noted that the government has consistently asserted that petitioners were restricted to their

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

MORTON HOLLANDER,
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Attorneys.

JULY 1965.

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compensation remedies. Most of the petitioners here have in fact already been accorded such relief (See 212 F. Supp. 216, n. 1, Pet. 12).

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